No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants.

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Eastern Division

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JURISDICTION

This action was commenced in the United States District Court for the District of Idaho, Eastern Division, by filing of Complaint on September 19, 1955 (R.3-7) and Service of Summons on Leo O'Connell, Commissioner of Insurance for the State of Idaho, statutory agent for defendant, on September 22, 1955 (R.7-8). Jurisdiction is based upon

diversity of citizenship and the amount in controversy exceeding $3000.00, exclusive of interest and costs (R.3, 17, 22, 23). The jurisdiction of the District Court is invoked pursuant to 28 U.S.C.A., Section 1332.

On January 31, 1958, the District Court entered Judgment in favor of defendant and against the plaintiff (R.192-196), and on February 24, 1958, Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, was filed by plaintiff.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C.A. Section 1291 and 1294.

QUESTIONS PRESENTED AND MANNER IN WHICH THEY ARE RAISED

I.

Whether the Trial Court erred in holding that the verdict in the State Court action of Campbell et al v. Elle et al operated as a final determination of the issue as to whether the vehicle involved, being driven by M. Burke Horsley, an employee of C. H. Elle Construction Company, was being operated with the consent of the named insured of appellee. This and incidental questions are raised by the Opinion (R. 182-186) and Exceptions to Findings of Fact and Conclusions of Law and Proposed Amendments to Findings of Fact and Conclusions of Law (R.187-190).

II.

Whether the Trial Court erred in not holding that the vehicle insured by the appellee was being operated at the time of the collision within the provisions of the wording of the "omnibus clause," contained in the policy of insurance issued by the appellee. This question is raised by the Opinion of the Court (R.182-186) and Exceptions to Findings of Fact and Conclusions of Law and Proposed Amendments to Findings of Fact and Conclusions of Law (R.187-190).

III.

Whether the Trial Court erred in not determining that the use of the vehicle was within the coverage and use set forth in the insurance policy issued by the appellee. This question is raised by the Opinion of the Court (R.182-186) and the Exceptions to Findings of Fact and Conclusions of Law and Proposed Amendments to Findings of Fact and Conclusions of Law (R.187-190).

IV.

Whether the Trial Court erred in not adopting the Proposed Findings of Fact and Conclusions of Law presented by appellants. This question is raised by the Opinion of the Court (R.182-186) and Exceptions to Findings of Fact and Conclusions of Law and Proposed Findings of Fact and Conclusions of Law (R.187-190).

V.

Whether the Judgment of the Trial Court ought to be reversed and Judgment entered for the appellants in the amount of $13,630.93 plus interest and costs.

STATEMENT OF FACTS

On August 22, 1954, there was in effect Policy No. UI-518973 issued by the Western Casualty and Surety Company, defendant herein, to William S. Gagon, Soda Springs, Idaho, covering a certain 1954 Chverolet 6-wheel 2-ton truck, Serial No. X54F018590. On August 22, 1954, and for many years prior thereto, Mr. William S. Gagon and Jessie Gagon, had been husband and wife, living in Soda Springs, State of Idaho (R.108).

In the City of Soda Springs, Idaho, there is a lumber yard known as Gagon Lumber Yard, operated by Mr. Gagon, and Mrs. Gagon was, as well as having her community property interest therein, the bookkeeper, and as such was actively engaged in assisting in running the business (R.108). On August 22, 1954, they owned the above described vehicle (R.109).

One M. Burke Horsley was employed by C. H. Elle Construction Company, a corporation, and was so acting during the activities set forth hereafter (Request for Admissions II (d) and (e), (R.47); together with Responses thereto (R. 60-61; R.137). On August 22nd, 1954, the said M. Burke Horsley was operating the above described Chevrolet Truck

in an easterly direction on U. S. Highway 30 North at a point approximately two and one-half miles west of Soda Springs, Caribou County, Idaho, when he was involved in a collision with a vehicle driven by one Arnold Campbell (Plaintiffs' Request for Admissions II (c) (R.47); Response (R.60). As a result of said collision, the said Arnold Campbell lost his life, and on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Bannock, by Mary Lou Campbell, his widow, and Terrell Ray Campbell and Curtis Howard Campbell, his children, against C. H. Elle Construction Company, a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, said Complaint praying for money damages for the death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,620.00 (copy of 2nd Amended Complaint attached to Stipulation (R.153-159); Plaintiffs' Request for Admissions, paragraph II (f) (R.47); Response (R.61). Demand was made upon the defendant, Western Casualty and Surety Company to assume the defense, costs and other obligations pursuant to the contract of insurance noted above, said demand being a letter dated March 30, 1955, addressed to Western Casualty Company, Fort Scott, Kansas, through: O. R. Baum, Attorney at Law, Carlson Building, Pocatello, Idaho (Plaintiffs' Request for Admissions, paragraph II (i). (R.49, 57-58) and Response thereto (R.62). Defendant refused to assume the defense, to pay the costs and other obligations of said action.

Upon Defendant's refusal, as above, St. Paul-Mercury Indemnity Company, by virtue of its multiple coverage policy, Policy No. 6210145 covering C. H. Elle Construction Company, provided the defense of the said C. H. Elle Construction Company, M. Burke Horsley, and Max Larsen. (Stipulation, (R.151). On October 3, 1954, the Second Amended Complaint was answered on behalf of C. H. Elle Construction Company and M. Burke Horsley (see Exhibit C and Exhibit C-1 attached to Stipulation, (R.166-176). As a result of the refusal of the Western Casualty and Surety Company to assume the defense in the case of Campbell, et al, vs. C. H. Elle Construction Company, et al, the present action was filed on September 19, 1955 and service obtained September 22, 1955 (R.7). Original complaint was later amended, bringing in the St. Paul-Mercury Indemnity Company, for the reason that Judgment in the State Court case had been rendered and the St. Paul-Mercury Indemnity Company had paid said judgment and costs (R.17.22).

On the 23rd day of December, 1955, a Judgment was entered in the State Court in favor of Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell against C. H. Elle Construction Company and M. Burke Horsley, in the amount of $15,000.00 with costs in the amount of $371.40. This Judgment was the result of the verdict of the jury (Exhibit D, Exhibit E and Exhibit F of the Stipulation (R.177-179).

In addition to the payment of the above described

amounts, the appellants incurred attorneys' fees and costs of said counsel in the amount of $1,500.00 for attorneys' fees and $139.53 for costs advanced by counsel (Paragraph III (b) of Stipulation with attached statement. (R.151, 181-182).

Under the above described policy of insurance written by the Western Casualty and Surety Company, there is contained as Paragraph III under insuring agreements the following: "With respect to the insurance of bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission * * *" (R.52). Said policy also contains the following provision under Paragraph II of insuring agreements: "As respects the insurance afforded by the other terms of this policy under coverages A and B, the company shall:

> "a. Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if said suit is groundless, false or fraudulent; * * *" (R.52).

The existence of the policy of Western Casualty and Surety Company is admitted (R.60). The fact that M. Burke Horsley was operating the 1954 Chevrolet Truck and was involved in a collision, is admitted (R.47). The facts of the state court suit and judgment and payment are admit-

ted (R.47, 61, 151). The basic question of fact is whether or not the use of this vehicle by M. Burke Horsley comes within the provisions of the so-called "omnibus clause". That is, whether or not M. Burke Horsley was using said truck with the permission as set out in said clause. The facts as to such permission will be set forth hereinafter during the argument.

It should also be noted that under date of October 5, 1954, there was filed S.R. 21, Notice of Policy, under Section 5 of Idaho Motor Vehicle Safety Responsibility Act signed by A. W. Kay, Secretary, Amercian Agencies, Inc., General Agents, Western Casualty and Surety Company, Fort Scott, Kansas. This S. R. 21 states that the policy of Western Casualty and Surety Company did apply to the above operator, M. Burke Horsley (R.151).

The case was thereupon submitted to the trial court pursuant to the Stipulation with documents attached, the Requests for Admission and Replies, and the depositions of Jessie Gagon, Wm. S. Gagon, M. Burke Horsley, and C. H. Elle (R.151-182).

Whereupon, the trial court pursuant to Opinion, dated September 25, 1957, ruled that the verdict in the state court action by which the jury found in favor of Gagon, was conclusive on the issue of permissive use as prescribed in the present action, and ordered judgment in favor of defendant-appellee (R.182-186). Judgment was entered on February 24, 1958 (R.196).

SPECIFICATION OF ERRORS

I.

The Trial Court erred in holding that the verdict in the state court action of Campbell et al v. Elle et al operated as a final determination of the issue as to whether or not the vehicle involved was being operated by the employee of C. H. Elle Construction Company with the consent of the named insured of the appellee herein.

II.

The Trial Court erred in not holding that the vehicle insured by Western Casualty and Surety Company was being operated at the time of the collision with the permission of the named insured under the terms and conditions of the insurance policy issued by appellee.

III.

The Trial Court erred in not holding that the appellant, C. H. Elle Construction Company, became an also insured, and that the insurance coverage under the policy of the appellee became the primary insurance coverage up to the limits of said policy.

IV.

The Trial Court erred in not holding that the use of the vehicle by M. Burke Horsley, as employee of C. H. Elle

Construction Company, was within the coverage and uses set forth in the policy issued by appellee.

V.

The Trial Court erred in not holding that appellee had the duty to defend C. H. Elle Construction Company and M. Burke Horsley in the state court action of Campbell et al v. Elle et al, and in not holding that appellee was required to pay the costs, interests and the judgment therein, up to the limits of its policy.

VI.

The Trial Court erred in finding that portion of Findings of Fact No. II as follows:

> "Said policy last referred to also contains the following provisions:
>
> "This Insuring Agreement does not apply * * * under Section A (except with respect to liability assumed under contract) 1. Bodily Injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance, or repair of an automobile'."

on the grounds and for the reason that the same is immaterial.

VII.

The Trial Court erred in finding that portion of Findings of Fact No. III as follows:

> "* * * On that date M. Burke Horsley, an employee of Elle Construction Company, one of the plaintiffs herein, went to the home of Wm. S. Gagon, the named insured under the Western policy, and borrowed the key to the 1954 Chevrolet truck from Jessie Gagon, the wife of Wm. S. Gagon, the named insured in the Western policy."

on the grounds and for the reason that, in view of the evidence, said Finding is incomplete and inaccurate.

VIII.

The Trial Court erred in its Conclusions of Law as follows:

> "That the verdict in the State Court action, above referred to, in which the jury found in favor of the insured Gagon operates as a final determination of the issue concerning the operation of the vehicle with the owner's consent. By such finding the jury concluded that M. Burke Horsley was not operating the car with the consent of William S. Gagon, and that question having been finally decided, such finding is not reviewable by this Court in the instant action, and that that determination in the case of Mary Lou Campbell vs. C. H. Elle Construc-

tion Company is final, conclusive, and binding upon the parties to this suit,"

on the grounds that the same is not supported by the evidence and is contrary to law.

IX.

The Trial Court erred in refusing to adopt the Conclusions of Law proposed on behalf of the appellants as set out at R.189-190.

X.

The Trial Court erred in entering Judgment in favor of the appellee and against the appellants.

ARGUMENT

I.

VERDICT IN PRIOR STATE COURT ACTION WAS NOT RES JUDICATA AND NOT DETERMINATIVE OF PRESENT ACTION

It is the position of the appellants that the trial court erred in holding that the jury verdict in the state court action was a final determination of the basic question in the case at bar.

In the state court action, Mary Lou Campbell, et al,

brought an action against C. H. Elle Construction Company, a corporation, M. Burke Horsley, Max Larsen and W. S. Gagon as defendants. Horsley and Larsen were sued for negligent operation of a truck which allegedly caused the death of one Arnold Campbell, while C. H. Elle Construction was made a party under the doctrine of respondeat superior as the employer of Horsley, and the allegations against W. S. Gagon were based upon the imputed negligence statute of the State of Idaho Section 49-1004 (R.30). There were no adversary pleadings between these various co-defendants, and there could not have been.

The jury in the state court case held against M. Burke Horsley and C. H. Elle Construction on the grounds of negligence, and further held, by their verdict, that the negligence of M. Burke Horsley was not imputed to W. S. Gagon under provisions of Idaho Code, Section 49-1004.

The present suit began (after the complaint was filed in the Campbell suit but before answers were filed therein by any of the defendants) as a result of the demand from C. H. Elle Construction Company that the Western Casualty and Surety Company honor its policy provisions set forth in Policy UI518973 with Wm. S. Gagon as insured, which, under the "omnibus clause" and "duty to defend" clause, it was alleged, required the Western Casualty & Surety Company to assume the defense of C. H. Elle Construction Company and M. Burke Horsley and to pay any judgment against them up to the limits of the policy, and to pay all costs of defense.

The question and issue herein is the interpretation of the provisions of Policy UI-518973 issued by Western Casualty and Surety Company. This is distinct, different and not related to the issue presented in the state court dealing with the phrasing of the statutory provisions of Section 49-1004, Idaho Code.

The "omnibus clause" in an automobile liability policy is not intended to extend coverage only to such other users of insured's vehicle as whose negligence would be imputed to the named insured under the permissive use statutes. Pleasant Valley Lima Bean Growers and Warehouse Assn. vs. Cal-Farm Ins. Co., 298 P.2d 109 (Calif.). As pointed out in this case, an "omnibus clause" is not necessarily synonymous and identical with the "permissive use" statutes such as prevail in the State of California and, incidentally, the State of Idaho.

It is submitted that the issues framed in the State Court action and the issues in this action are different. To maintain successfully a plea of res judicata it must appear that the precise question was raised and determined in a former suit. Nowhere did the state court have before it the insurance contract now involved. Nowhere in the state court proceeding was the phrasing and wording of the insurance policy of Western Casualty and Surety Company considered. The state court suit, as far as Gagon was concerned, was upon the imputed negligence or permissive use statutes of the State of Idaho. The present suit is upon the interpretation of a contract and the contractual relation growing out of the insurance policy. The issues were not, as is required for a

holding of res judicata, precisely the same. There is no identity of the thing sued for; there is no identity of the cause of action; there is no identity of the parties; and there is no identity of the persons for or against whom the claim is made.

The Supreme Court of the State of Idaho has held many times that if the precise question was not raised and determined in a former suit, the defense of res judicata could not be maintained.

In Collard vs. Universal Automobile Ins. Co., 55 Idaho 560, 45 P.2d 288, Syllabus 8 is as follows:

> "To successfully maintain plea of res judicata, it must appear that precise question was raised and determined in former suit."

On Page 292 of Pacific reports, the Court states as follows:

> "The plea of res judicata is an affirmative defense, and the burden rests on the party asserting it to establish all of the essential elements thereof by a preponderance of the evidence. Abraham vs. Owens, 20 Or. 511,, 26 P. 1112. From an examination of the record and the authorities, we are not constrained to hold that the plea of res judicata and estoppel were established by the appellant. It would seem quite clear that the present action presents an entirely different cause of action than that involved in the case

> of Peterson vs. Universal Automobile Ins. Co., supra, and, even conceding that respondent was a party or privy to that action, in order to successfully maintain the plea of res judicata, it must have been made to appear that the precise question was raised and determined in the former suit. Rogers vs. Rogers, 42 Idaho, 158, 243 P. 655."

In the case of Rogers vs. Rogers, 42 Idaho 158, 243 P. 655, syllabus 2 is as follows:

> "The identical issue must have been raised and determined in a former suit for its decree to be res judicata of question."

And on Page 656 Pac. Rep. the court states as follows:

> "Identity of issue is one of the essentials of res adjudicata, and it must appear that the precise question was raised and determined in the former suit. Wood River Power Co. vs. Arkoosh, 215 P. 975, 37 Idaho, 348; Mason vs. Ruby, 204 P. 1071, 35 Idaho, 157; Berlin Machine Works vs. Dehlbom L. Co., 160 P. 746, 29 Idaho, 494; Marshall vs. Underwood, 221 P. 1105, 38 Idaho, 464."

In Mason vs. Ruby, 35 Idaho, 157, 204 P. 1071, the court states as follows on Page 1072 Pac. Rep.

> "In other words, respondent claims that in order to constitute the judgment of the probate court a bar

to this action appellant must show clearly, not only that this question was raised by the pleadings, but that it was actually decided by the probate court in that action.

"We think the contention of respondent must be sustained. The decision of the probate court may have rested upon either one or the other of the grounds stated, and there is a total lack of evidence showing that the question of warranty was decided in the probate court. In the case of Russell vs. Place, 4 Otto (94 U.S.) 606, 24 L. Ed. 214, it was said by Justice Field:

"A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

"See, also, Goodenow vs. Litchfield, 59 Iowa, 226, 9 N. W. 107, 13 N.". 86; Zoeller vs. Riley, 100 N. Y. 102, 2 N.E. 388; 53 Am. Rep. 157; Fowlkes vs. State, 14 Lea, (Tenn.) 14; Chamberlain vs.

Gaillard, 26 Ala. 504; Hoover vs. King, 43 Or. 281, 72 Pac. 880, 65 L.R.A. 790, 99 Am. St. Rep. 754; Lea vs. Lea, 99 Mass. 493, 96 Am. Dec. 772; 23 Cyc. 1308; 15 R.C.L. s 454, p. 980.

> "In this state of the evidence the court did not err in giving the instruction objected to."

In Marshall vs. Underwood, 38 Idaho 464, 221 P. 1105, the Idaho Supreme Court states as follows relative to the identity of the issues:

> "And in order that this rule should apply, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first. Jensen vs. Berry & Ball Co., 37 Idaho, 394, 216 Pac. 1033; 23 Cyc. 1300."

See also Miller vs. Mitcham, 21 Idaho 741, 123 P.941; Wood River Power Company vs. Arkoosh, 37 Idaho 348, 215 P. 975; Jensen vs. Berry & Ball Co., 37 Idaho 394, 216 P. 1003; Lawrence vs. Corheille, 32 Idaho 114, 178 P.834.

The cause of action, therefore, between the state court action and the present action, is different. The parties are different, the issues are different, and, more important, C. H. Elle Construction Company and Gagon, the insured of the

present appellee, were co-defendants in the state court proceeding, and no adversary proceeding was had between them or their insurance carriers.

The law, we submit, is that a judgment in favor of a plaintiff in an action against two or more defendants is not re judicata or conclusive of the rights and liabilities of the defendants *inter se* in a subsequent action between them unless those rights and liabilities are expressly put in issue by adversary pleadings and determinations.

The question now before the court in this action is not based upon the pleadings of Mary Lou Campbell and her children (plaintiffs in the state action) but is based upon an interpretation of the wording of the policy of insurance issued by the Western Casualty & Surety Company, which company was not a party in the state court proceedings and could not have been made a party. C. H. Elle Construction Company and its employee, M. Burke Horsley, were co-defendants with Wm. S. Gagon in the state court action. There were no adversary proceedings between them; there were no pleadings or claims, one against the other. The liabilities as between the insuror of C. H. Elle Construction Company and the insuror of Wm. S. Gagon were not, and could not have been, presented in the state court action. The state court action was one in tort against several tort feasors, and any allegation of insurance coverage of either or any of the defendants, or allegations of a dispute between the insurance carriers of any of the defendants, was not covered and could not have been made an issue.

Because there was no adversary position, C. H. Elle Construction Company could not control the pleadings against Gagon; nor could it control the evidence used against Gagon adduced by the plaintiffs in the state court action. C. H. Elle Construction Company could not introduce controverting evidence.

Because the Western Casualty & Surety Company was not a party, some of the evidence now available as to permissive use under the terms of the policy could not be introduced in the state court action. Some of these items of evidence include the wording of the policy of Western Casualty & Surety Company; the admission of permissive use contained in the SR-21 which appellants herein contend is now material because it is an admission against interest by a party to the present suit; the fact of the duty to defend C. H. Elle Construction Company and M. Burke Horsley which arises from the wording of the policy issued by the Western Casualty & Surety Company; the conversations between Wm. S. Gagon and the agent of the Western Casualty & Surety Company, as are now presented in the evidence in this action.

C. H. Elle Construction Company could not appeal the verdict and judgment rendered thereon in the state court as it dealt with the question between the plaintiffs therein and Wm. S. Gagon. They would have had no standing in an appellate court to get a review of this question. They had no control over the presentation, judgment, or appeal of this question. It is submitted that the question now presented was not and could not have been adjudicated in the state court

proceedings, and as a result there could be no estoppel or rule of res judicata to bar the presentation of the present controversy.

As stated in 30-A Amer. Juris. 466, Judgments, Section 411,

> "The generally prevailing view is that parties to a judgment are not bound by it in subsequent controversies between each other, where they are not adversary in the action in which the judgment is rendered and their rights and liabilities inter se are not put in issue and determined. This is true whether judgment is rendered in favor of the plaintiff or determining the issues in favor of the defendant. The rule applies to a fact which might have been, but was not, litigated in the original action. The theory of many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant, and leave unadjudicated the rights of the defendants as among themselves."

In Dobbins vs. Barnes (CA 9) 204 F.2d 546, the court holds in Syllabus 1 as follows:

> "Parties to action are not bound by judgment, in subsequent controversy with each other, unless they were adversary parties in original suit."

On Page 548, it is stated:

> "* * * In the proceedings in the Tax Court Dobbins and Barnes were not adversaries. It is a rule of universal application that 'Parties to an action are not bound by the judgment, in a subsequent controversy with each other, unless they were adversary parties in the original suit.' City Bank of Wheeling vs. Rhodehamel, 4 Cir., 223 F. 979, 983. 'The reason for the rule is that one should not be bound by a judgment except to the extent that he or some one representing him had an adequate opportunity to litigate the issue adjudicated with the party who seeks to invoke the judgment against him.' Ohio Casualty Ins. Co. v. Gordon, 10 Cir., 95 F.2d 605, 609. This rule, stated in Freeman on Judgments, 5th Ed., Vol. 1, s 422, is followed in California, Standard Oil Co. vs. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797, and is recognized in Pennsylvania, Jordan vs. Chambers, 226 Pa. 573, 75 A. 956; Simodejka vs. Williams, 360 Pa. 332, 62 A.2d 17."

In the case of Brown vs. Great American Indemnity Co. (Mass.), 9 N. E. 2d 547, at 549, the following quotation indicates the holding of the Court:

> "That decision by the Supreme Court of Rhode Island did not adjudicate the controversy now before us. It is true that both the plaintiff and the defendant were parties defendant in the suit in Rhode Island.

But they were not adversaries. There was no controversy between them. The present plaintiff was seeking no relief against the present defendant. Both were summoned to defend against Byron's attempt to reach the proceeds of the policy. The rights of the present plaintiff against the present defendant were not adjudicated, even though Byron, who in reason was in fully as favorable a position as the present plaintiff. Commonwealth vs. Newton, 186 Mass. 286, 71 N.E. 699; Bluefields Steamship Co., Ltd., vs. United Fruit Co. (C.C.A.) 243 F. 1, 19; The No. 34 (Petition of L. Boyer's Sons Co.) (CCA) 25 F. 2d 602; Pearlman vs. Truppo, 159 A. 623, 10 N.J. Misc. 477; Snyder vs. Marken, 116 Wash. 270, 199 P. 302, 22 A.L.R. 1272."

This question was exhaustively treated in the case of Mickadeit vs. Kansas Power & Light Co. (Kansas), 257 P.2d 156. On Page 161 the court states as follows:

"In 101 A.L.R. 104 is an annotation on 'Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and the nonliability of the other,' where after stating the principal aspects as to the question, it is said:

" 'While the cases are not entirely in harmony, sometimes even in the same jurisdiction, the rule

supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not res judicata inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, and determined by the judgment in the first action.'

"Many authorities are cited in support of the rule stated in the discussion treating the various phases of the question. See also supplementary annotation on the same subject in 142 A.L.R. 727, and annotation on a related subject in 25 A.L.R. 2d 710.

"In discussing the conclusiveness of a judgment as to coparties it is said in 50 C.J.S., Judgments, s 819, p. 372, that

" 'A judgment ordinarily settles nothing as to the relative rights and liabilities of the coplaintiffs or codefendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated, and determined'."

In the case of Preferred Accident Ins. Co. of New York vs. Musante, Berman & Steinberg Co. (Conn.), 52 A.2d, 862, Syllabus 5 is as follows:

"Judgment against codefendants creates no lia-

bility between them if none before existed."

Syllabus 6 is as follows:

> "A judgment in favor of plaintiff in an action against two or more defendants is not res adjudicata or conclusive of the rights and liabilities of defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in first action by cross-complaint or other adversary pleadings, and determined by the judgment in the first action."

And on Page 864, the court states:

> "* * * There were no adversary pleadings. The record does not show an attempt by either the present defendant or the lessees to escape liability by claiming that the other was solely liable. It does not fairly appear that they were adversaries, at least to such an extent as to render the judgment conclusive as to the rights and liabilities of the codefendants as to each other."

The holding in the case of Remus vs. Schwass, (Ill.) 92 N.E.2d 127, is clearly set forth, beginning at Page 131:

> "* * * An analysis of the record discloses that in the dramshop action the answers filed by appellant and appellees were both addressed to the allegations of the complaint filed there and do not purport to controvert any question of equitable ownership as

between them, and no adjudication of such issue was made. The parties to the instant case were on the same side in the dramshop case. The rule is that parties on the same side of litigation are not bound by a judgment or decree in subsequent controversies between them respecting their rights, unless they have formed or contested an issue respecting the same and the judgment or decree has determined such rights. Jones vs. Koepke, 387 Ill. 97, 55 N.E.2d 154, and cases there cited. We are of the opinion the appellant here is not barred from asserting her equitable claim."

In the case of Bunge vs. Yager (Minn.), 52 N.W.2d 446, Syllabus 1 is as follows:

"A judgment in favor of a plaintiff in an action against two or more defendants is not res judicata or conclusive of rights and liabilities of defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in first action, by cross-complaint or other adversary pleadings, or such issues were tried by consent and determined by judgment in first action."

Syllabus 2 states as follows:

"Rule that parties must be adversaries before judgment in favor of a plaintiff in an action against both of them is res judicata or conclusive of rights and liabilities of parties inter se in a subsequent action between them applies as well to an estoppel by judg-

ment as to an estoppel by verdict."

On Page 447 the court states:

"While the authorities are not in harmony, the general rule followed by the great weight of authority is that a judgment in favor of a plaintiff in an action against two or more defendants is not res judicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, or such issues were tried by consent and determined by the judgment in the first action. The cases are collected in Annotations, 101 A.L.R. 104, 142 A.L.R. 27; 30 Am. Jur., Judgments, s. 233.

"The general rule is stated in Restatement, Judgments, s 82, as follows: 'The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves.'

"In 1 Freeman, Judgments (5th ed.) s 422, we find the rule stated thus: 'Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action. There must have been an issue or con-

troversy between them. The reason for this rule obviously is the same as that which underlies the whole doctrine of res judicata, namely, that a person should not be bound by a judgment except to the extent that he, or someone representing him, had an adequate opportunity not only to litigate the matters adjudicated, but to litigate them against the party (or his predecessor in interest) who seeks to use the judgment against him.'

"We early became committed to the same rule. In Pioneer Savings & Loan Co. vs. Bartsch, 51 Minn. 474, 479, 53 N.W. 764, 765, 38 Am. St. Rep. 511, speaking through Mr. Justice Mitchell, we said: 'It is well settled that parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversary parties in the original action. Freem.Judgm. s 158'."

See also the annotation, 101 A.L.R. 104-108, with cases cited therein, footnote to Sec. 411 Judgments, 30-A Amer. Jur. 466; Walin vs. Young (Ore.) 180 P. 2d 535; Crompton vs. Lumberman's Mutual Casualty Co. (Mass.); 135 N.E. 2d 14; The Rainbow Stone Co. vs. The Ten Color Stone Co. (Ohio), 141 N.E. 2d 266; Whitney vs. Employers Indemnity Corp. (Iowa.), 202 N.W. 236.

II.

APPELLATE COURT HAS AUTHORITY TO DETERMINE ISSUES HEREIN

The entire proceedings in this case were submitted to the

trial judge upon a written Stipulation with exhibits attached (R.149-182), Requests for Admission and Replies to Request for Admission filed by the respective parties (R.46-103), Plaintiffs' Additional Request for Admission and Response thereto (R.103-106), Deposition of Jessie Gagon (R.106-118), Deposition of William S. Gagon (R.119-130), Deposition of M. Burke Horsley (R.135-144), and the Deposition of C. H. Elle (R.144-148). The record is, therefore, complete and consists entirely of documentary and written evidence. In addition the record, as presented, is essentially uncontradicted and contains no basic factual disputes. No issue of the credibility of witnesses exists and the record does not present any genuine issue as to material fact. Under these circumstances, it is proper for, and the duty of, the Appellate Court to consider the whole record since the Appellate Court is in as good a position as the Trial Court to appraise the evidence and the questions of law presented thereby.

Since the Trial Court made no findings on any of the basic issues of the case, other than the one discussed in Paragraph I above and since the case was submitted on documentary and written evidence, it is submitted that it is proper and essential for the Appellate Court to decide the remaining issues.

In Kostelac vs. United States (C.A.9) 247 F. 2d 723, syllabus 1 is as follows:

> "Where substantially all facts are stipulated in pre-trial order, and trial court makes no finding of

facts on issue, and evidence before reviewing court on issue is written as it was before trial court, it is proper for reviewing court from such uncontroverted written evidence to make finding of fact on issue."

On Page 726, the Court states as follows:

"The District Court found that there was 'no question but that Kostelac made an error * * * when he prepared his bid', but concluded that it was unnecessary to decide whether Kostelac ever had such a right, because, if he did, he had waived it.

"However, this question is not only material, it is the first question which must be decided. Since substantially all of the facts concerning the contract, the negotiations after the mistake was discovered, and Kostelac's default were stipulated in the pretrial order, the question before this court would be whether the trial court's finding on this point was supported by the record, if the trial court had made a finding. Since the court has made no finding and since the evidence on this question is written, as it was before the trial court, it is proper for this court from such undisputed written evidence to decide whether Kostelac was entitled to rescind the contract because of the mistake as to the quantity of garbage produced per man per day at the base."

In this decision, the Court of Appeals, Ninth Circuit, quotes with approval, the case of Orvis vs. Higgins, (CCA.2)., 180 F.2d 537.

In the case of Yanish vs. Barber, (C.A.9) 232 F.2d 939, syllabus 11 is as follows:

> "A recognized exception to general rule requiring a case to be sent back for lack of findings is where record considered as a whole does not present a genuine issue as to any material fact. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A."

Syllabus 12 is as follows:

> "When facts are undisputed, though no finding is made, case need not be remanded. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A."

On Page 947, the Court says:

> "But not every case, where there is a failure to make findings must be sent back to the district court. 'The fact that the district judge made on findings and announced no conclusions upon this issue, does not require remand, since the record is complete', Hazeltine Research, Inc., vs. General Motors Corp., 6 Cir., 1948, 170 F.2d 6, 10.
>
> "Moore's Federal Practice (2d Ed.) Vol. 5, states at p. 2662, 'The failure of the trial court to comply with Rule 52, while characterized as a dereliction of duty does not demand a reversal 'if a full understanding of the question presented may be had without the aid of separate findings',' quoting from Shellman vs. Shellman 1938, 68 App.D.C. 197, 95 F.2d 108, 109, and citing cases.

> "A recognized exception to the general rule, requiring a case to be sent back for lack of findings, is where '* * * the record considered as a whole does not present a genuine issue as to any material fact * * *'. Burman vs. Lenkin Const. Co., 1945, 80 U. S. App. D.C. 125, 149 F.2d 827, 828. See Urbain vs. Knapp Brothers Mfg. Co., 6 Cir., 1954, 217 F.2d 810, 816, 817, quoting Burman vs. Lenkin Const. Co., supra, with approval. So when the facts are undisputed, though no finding is made, the case need not be remanded, Sbicca-Del Mac, Inc., vs. Milius Shoe Co., 8 Cir., 1955, 145 F.2d 389, 400, and cases cited; Aetna Life Ins. Co. vs. Meyn, 8 Cir., 1943, 134 F.2d 246, 249."

In the case of Equitable Life Assurance Society of the United States vs. Irelan (CCA 9) 123 F.2d 462, the trial court made a finding of accidental death in a suit on a double indemnity clause of an insurance policy. The Appellate Court determined that the evidence, which was by deposition, overcame the presumption of accident considered controlling by the trial court and that the facts proved suicide, whereupon judgment was so entered. Syllabus 2 is as follows:

> "Where all testimony bearing on circumstances antecedent to and surrounding death of insured was by deposition, the finding of accidental death, while entitled to consideration has not the weight appellate court would otherwise be obliged to concede to it, since appellate court is in as good a position as trial

court was to appraise the evidence, and has the burden of doing that. Federal Rules of Civil Procedure, rule 52 (a), 28 U. S. C. A. following section 723c."

Syllabus 3 is as follows:

"The federal rule relating to findings by the court was intended to accord with the decisions on the scope of review in federal equity practice, wherein if testimony is by deposition, reviewing court gives slight weight to the findings. Federal Rules of Civil Procedure, rule 52 (a), 28 U. S. C. A. following section 723c."

In the case of Smith vs. Dravo Corp., (C.A.7), 208 F. 2d 388, on Page 391 the court states:

"The findings and conclusions made in our original decision and amplified by this one are amply justified without remand for additional findings as to those items. Under Title 28 U.S.C. at 2106 the appellate court may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order * * * and may remand the cause and direct the entry of such appropriate judgment, decree, or order" as may be "just under the circumstances." Ordinarily, as to issues upon which no findings have been made, the court will reverse with directions to make findings and conclusions, but in equity, where the record is complete or the evidence uncontradicted or entirely documentary, the appellate court is bound to decide

the case, so far as it is in condition to be decided, and direct such a decree as under all circumstances may be proper. Ridings v. Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. Ed. 401; U.S. vs. Rio Grande Dam & Irrigation Co., 184 U.S. 416, 22 S. Ct. 428, 46 L. Ed. 619; Weeks vs. Pratt, 5 Cir., 43 F.2d 53, certiorari denied 282 U.S. 892, 51 S. Ct. 106, 75 L.Ed. 786; Potter vs. Beal, 1 Cir., 50 F. 860. In Shore vs. United States, 7 Cir., 282 F. 857 this court said at 860: 'There is no question but that this court, on an appeal from a decree in an equity suit, may consider the evidence, and make findings of fact which are determinative of the controversy.' In McComb vs. Utica Knitting Co., 2 Cir., 164 F. 2d 670, at page 674, the court, after observing that the trial judge did not discuss a certain question or make any finding on it, citing a number of cases, said: 'As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him.' In Weeks vs. Pratt, 1 Cir., 43 F.2d 53, 56, the court concluded 'This is an appeal in equity. The whole case is before us, and we may render such decree as may be just and proper in in premises. Ridings vs. Johnson, 128 U.S. 212, 9 S.Ct. 72, 32 L. Ed. 401'."

In McComb vs. Utica Knitting Co., (CCA2), 164 F.2d 670, at 674 the court states:

"In the instant case, the trial judge did not dis-

> cuss this question, nor did he make any finding which bears on it. All the evidence here of a kind similar to that in the Belo record we have also set forth in our Appendix. As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him."

And in the footnotes on Page 674, the court cites as its authority the following:

> "Kind vs. Clark, 2 Cir., 161 F.2d 36, 46; Letcher County vs. De Foe, 6 Cir., 151 F.2d 987, 990; Bowles vs. Beatrice Creamery Co., 10 Cir., 146 F. 2d 774, 780; J. S. Tyree, Chemist, Inc., v. Thymo Borine Laboratory Co., 7 Cir., 151 F.2d 621, 624; Equitable Life Assurance Society of United States vs. Irelan, 9 Cir., 123 F.2d 462, 464."

To the same effect see Norment vs. Stillwell (CCA2), 135 F.2d 132; Murphey vs. United States (C.A.9), 179 F.2d 743; Pacific Portland Cement Co., vs. Food Machinery and Chemical Corp., (C.A.9) 178 F.2d 541; The Texas Co. vs. R. O'Brien and Co., Inc. (C.A.1), 242 F.2d 526; Orvis vs. Higgins (C.A.2) 180 F.2d 537; Senato vs. United States (C.A.2), 173 F.2d 493; Burman vs. Lenkin Construction Co., (C.A.D.C.) 149 F.2d 827; Aetna Life Insurance Company vs. Meyn (CAA8), 134 F.2d 246; Hazeltine Research vs. General Motors Corp. (CA6), 170 F.2d 6; Sbicca-Del Mac vs. Milius Shoe Co., (CAA8) 145 F.2d 389.

III.

APPELLANT C. H. ELLE CONSTRUCTION COMPANY WAS AFFORDED PRIMARY INSURANCE COVERAGE UNDER OMNIBUS CLAUSE OF APPELLEE'S POLICY

Under the insurance policy of the Western Casualty and Surety Company, and under "insuring agreements," Paragraph III is as follows:

> "With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission * * *"

This is the modern standard so-called "omnibus clause." Its purpose is to extend the protection of the polciy to any person or persons coming within the defined group. It gives the insured power to bring within the protection of the policy a third person using the insured automobile with the permission of the named insured. Such person, while using the automobile within the provisions of the omnibus clause, becomes an additional insured by virtue of the clause, as if he were named as an insured in the policy. This so-called additional insured has the protection of the coverage of the policy and the insurance as to him becomes an independent liability;

that is, independent of the insurer's responsibility to the named insured. The rights of the parties are the same as if the operator had been a named insured. Under this type of clause, therefore, M. Burke Horsley and his employer, C. H. Elle Construction Company, if qualified under the "omnibus clause" as additional insureds, stand in exactly the same situation as if they had been the named insured, and the other provisions of this policy are available for their protection.

The so-called "omnibus clause" has been construed and considered numerous times by the courts. In 5-A Amer. Juris. 88, Automobile Insurance, Section 90, it is stated as follows:

> "Automobile liability insurance policies ordinarily contain a so-called 'omnibus clause,' providing that the term 'insured' includes the named insured and also any other person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the insured or with his permission. Policies containing such clauses have been held to be valid, and it has been held in a number of cases that the 'omnibus clause' is not ambiguous."

In Section 91 of the same citation, it is stated:

> "In the absence of eccentricities of form, it is clear that an 'omnibus clause' creates liability insurance in favor of one other than the named insured, answering the descriptions of persons therein contained. Such a person other than the named insured, while using the

> motor vehicle for the purposes for which it is insured, and within the scope of the permission granted, becomes an 'additional insured' by virtue of the 'omnibus clause' the same as if he were named as an insured in the policy. Upon the happening of an accident while the insured motor vehicle is being operated by a qualified additional insured with the permission of the owner, the insurance as to him becomes an independent liability—that is, independent of the insurer's responsibility to the named insured; and the rights of the injured person are the same as if the operator had been a named insured."

In 5 Amer. Jur. 804, Sec. 532, it is stated:

> "Independently of the general insuring clause in an automobile liability policy, ofttimes there appears, * * * a clause purporting, or the effect of which it, to extend the protection of the policy to any person or persons coming within a defined group. This is the so-called 'omnibus' clause."

And in Section 533 of the same citation, it is stated:

> "* * * In the absence of eccentricities of form, it is clear that such a clause creates liability insurance in favor of one other than the named assured answering the description of persons therein contained."

The appellants herein are not concerned with fastening imputed liability on the owner of the vehicle, William S. Gagon. They do not seek to be the beneficiaries of any statu-

tory-created liability. The appellants seek to apply the policy language as a source of financial discharge of C. H. Elle Construction Company's liability to the persons injured through the negligence of the employee of the C. H. Elle Company. The matter of the owner's imputed liability involved in the State Court action is not involved here: the question of the operator's coverage under the owner's policy was not involved in the State Court case of Campbell, et al vs. C. H. Elle, et al but is the basic question involved herein. It is submitted, therefore, that the only consideration in this matter is the construction of the "omnibus clause" and whether or not the facts herein bring the employee of C. H. Elle Construction Company within the coverage of said policy.

In Crompton vs. Lumberman's Mutual Casualty Company, (Mass.) 129 N.E.2d 139, the Court in discussing generally the "omnibus clause," on Page 140 states as follows:

> "The policy was not limited to indemnifying the named insured for damages caused by his operation of the motor vehicle or by one, like his servant or agent, for whose action he might be liable at common law, but it provided indemnity for those whose operation of the automobile with the consent of the named insured had caused injuries to others."

And on Page 142, the Court says:

> "We think, that, on the allegations contained in the declaration when read with the terms and conditions of the policy, the plaintiff upon the occurrence of the accident to Hansen was entitled to the

same protection by virtue of the permissive use given to him by his father as the latter would have had if he had been operating the automobile at the time of the accident. Lahti vs. Southwestern Automobile Ins. Co., 109 Cal. App. 163, 292 P.527; Century Indemnity Co. vs. Norbut, 117, N.J. Eq. 584, 177 A. 248, affirmed 120 N.J.Eq.337, 184 A. 822; MacClure vs. Accident & Casualty Ins. Co., 229 N.C. 305, 49 S.E.2d 742; State Farm Mutual Automobile Ins. Co. vs. Arghyris, 189 Va. 913, 55 S.E. 2d 16; Appleman Insurance Law & Practice, Sec. 4354. The plaintiff is entitled to be relieved from liability to pay the judgment recovered by Hansen to the same extent as if the action had been brought against the insurer by the named insured."

In Pleasant Valley Lima Bean Growers vs. Cal-Farm Insurance Co., 298 P.2d 109 (Calif.) (1956) it is stated in Syllabus No. 8 as follows:

"Omnibus clause in automobile liability policy extending protection as additional insured to any person while using insured vehicle and any person or organization legally responsible for use thereof, provided that such use was with named insured's permission, did not intend that extended coverage should be limited only to other users of insured vehicle whose negligence would be imputed to named insured under permissive use statute."

While this question has not been met directly by the

courts of the State of Idaho, there is the statement in the case of Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156, 213 P.2d 920, where Syllabus No. 1 is as follows:

> "Under Policy providing that term 'insured' includes any person while using automobile and any person or organization legally responsible for use thereof provided actual use of the automobile is with permission of named insured, son of insured using automobile with permission was an 'insured", and wife having become legally responsible for use of automobile by signing an application for driver's license for son was also an 'insured'."

In the case of New vs. General Casualty Company of America, 133 Fed. Supp. 955, the Court states as follows:

> "The law of the state of Tennessee is that both a named insured and an additional insured are entitled to protection against a liability and the insurer has obligated himself absolutely and unconditionally to pay judgments against either. Associated Indemnity Corp. vs. McAlexander, 168 Tenn. 424, 79 S.W.2d 556."

The Court further concludes:

> "It was not intended by the contracting parties that the omnibus clause could be used to decrease the protection of the insurance protection afforded the named insured by the policy. The omnibus clause

> or definition of insured merely causes the insurance to cover persons other than the named insured. This clause creates liability insurance in favor of another and places no limitation on the protection purchased by the named insured."

In Chatfield vs. Farm Bureau Mutual Auto Ins. Co., 208 F.2d 250, Syllabus 1 is as follows:

> "Generally, an 'omnibus clause' in an automobile liability policy should be construed liberally in favor of the insured and in accordance with the spirit of the clause to protect the public when an automobile is driven by one other than the insured owner."

In the case at bar, it is admitted and is without question that M. Burke Horsley was an employee of C. H. Elle Construction Company. It is clear, as is also brought out in the various answers which were filed thereto (Stipulation, Exhibits numbered "A", "C" and "C-1", (R. 153-176) that the liability of the C. H. Elle Consrtuction Company is that of a "master" or a "principal". The C. H. Elle Construction Company was, therefore, an organization legally responsible for the use of the vehicle in that the use of the vehicle was being controlled by its own employee.

In 5-A Amer. Juris. 90, Automobile Insurance, Sec. 92, it is stated as follows:

> "The usual omnibus clause in an automobile liability policy is expressly made to apply to any

person or organization 'legally responsible' for the use of the vehicle while the same is being used with the permission of the named insured. Ordinarily a person operating the car is 'responsible', or 'legally responsible,' 'for the operation' of the same, within the meanning of the omnibus clause. Furthermore, the parent of a person driving the car at the time of the accident, who, by signing his application for an operator's license, was made responsible by statute for damages caused by the car while it was driven by him, and against whom judgment was recovered on account of the accident, was a person 'legally responsible for the operation thereof,' within the meaning and effect of a clause of this character. The same result was reached as to an employer of the person who being then engaged in the conduct of the former's business, was driving the car at the time of the accident, on account of which judgment was recovered against such employer."

See also the case of Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Ida. 156, 213 P.2d 920; Oden vs. Union Indemnity Co. 286 Pac. 59 (Wash.)

It has, furthermore, been held in numerous cases that under situations like the case at bar where the truck owner had a policy of insurance with an "omnibus clause" and the employer of the driver of the truck had multiple-coverage policy or general insurance, that the coverage provided by the "omnibus clause" was primary and that insurer was liable.

In the case of Pleasant Valley Lima Bean Growers vs. Cal-Farm Ins. Company, 298 P.2d, 109, it is stated in Syllabus 11 as follows:

> "Where injury to truck driver was allegedly caused by negligence of warehouse owner's employee while assisting in unloading lima beans from truck into warehouse pit, and truck owner had automobile liability policy with omnibus clause and warehouse owner had public liability policy covering warehouse operations at time of the accident, obligation of insurer under automobile liability policy to defend personal injury action against warehouse owner and employee as additional insureds and to pay judgment therein was primary to obligation of insurer under the public liability policy."

In the above case, the 'omnibus clause" of the truck owner (Brucker) was held to include loading and unloading of the truck. The injured person was injured during the process of loading and unloading the truck. One Nungaray was injured and brought his action against the Pleasant Valley Lima Bean Growers Assn. and its employee, Croker; upon service of this Complaint, the United States Fidelity and Guaranty Company, who carried general liability insurance on the Pleasant Valley Lima Bean Growers Assn., took over the defense of the action on behalf of Pleasant Valley and Croker. Counsel for United tendered their defense of the Nungaray action to defendant (Cal-Farm) therein, but Cal-Farm refused to defend, denying any coverage under its policy with Brucker, the truck owner.

On Page 114, the Court states as follows:

> "It remains to be determined whether defendant's obligation to defend the Nungaray action and to pay judgment therein is primary to the obligation of United, plaintiff's insurer, or whether defendant is justified in arguing that both insurance companies must bear these expenses pro rata as concurring insurers. We are of the view that defendant's liability is primary to United and that United has liability secondary to that of defendant. * * * As the truck involved in the accident was owned by Pleasant Valley, United's insured, United's policy is excess insurance as to Pleasant Valley, and Cal-Farm's duty to defendant Pleasant Valley and pay judgment in the Nungaray action is primary to the obligation of United."

It is submitted, therfore, that under the wording of the "omnibus clause" in the policy of the Western Casualty and Surety Company, if M. Burke Horsley qualifies as an additional insured, than and in that event the Western Casualty and Surety Company had the obligation and the contractual duty to provide the defense of M. Burke Horsley and his employer, C. H. Elle Construction Company, and to pay any verdicts or liability assessed by suit against them.

As shown at R.75, the policy of insurance issued by the St. Paul Mercury & Indemnity Co. to C. H. Elle Construction Co. contained the following clause:

> "Other Insurance—No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any such policy or policies, bond or bonds, had such Insuring Agreement not been effective."

In other words, by force of the "omnibus clause" in the policy of Western Casualty & Surety Co., C. H. Elle Construction Company became as a named insured therein, and the coverage of the St. Paul-Mercury Indemnity Company was excess or secondary.

IV.

APPELLEE HAD DUTY TO ASSUME DEFENSE OF APPELLANT C. H. ELLE CONSTRUCTION COMPANY.

The Western Casualty and Surety Company had the duty to assume the defense of C. H. Elle Construction Company and M. Burke Horsley in the case of Campbell, et al, vs. Elle, et al. Under paragraph II of the insuring agreements of the Western Casualty and Surety Company's policy with William S. Gagon, it is provided as follows:

> "As respects the insurance afforded by the other terms of this policy under coverages A and B, the company shall:

> "A. Defend any suit against the insured alleging such injury, sickness, disease or destruction and seek-damages on account thereof, even if said suit is groundless, false or fraudulent. * * *"

It is to be noted that this paragraph uses the unqualified word "insured", which, under the definition in paragraph III therefore includes the named insured and includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. Therefore, it is submitted that the defendant-appellee in this action had the duty and the obligation under its contract to defend any suit against C. H. Elle Construction Company and M. Burke Horsley, even if the suit is groundless, false or fraudulent. This, we submit, cannot be avoided even if all other points are determined adversely to appellants.

It is undisputed in the facts herein that the Western Casualty and Surety Company refused to accept the defense of the above named individuals.

In 50 A.L.R.2d, Page 465, it is stated as follows:

> "It appears to be well settled that, generally speaking, the obligation of a liability insurance company under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations in such action."

This citation is supported by the citation of cases from Alabama, California, District of Columbia, Georgia, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin. And, in the same annotation on page 468, it is stated as follows:

> "And in Lamb vs. Belt Casualty Co. (1955), 3 Cal. App. 2d 624, 40 Pac.2d 311, it was said that to determine whether the insurance company was obligated to defend an action brought against the insured, the language of the policy must first be looked to, and next the allegations of the complaint for damages against insured.
>
> "Similarly, it was stated in Ritchie vs. Anchor Casualty Co. (1955) 135 Ca.App.2d 245, 286 P. 2d 1000; 'The Draftsman of a complaint against the insured is not interested in the question of coverage which later arises between the insurer and insured. He chooses such theory as best serves his purposes; if it be breach of contract rather than negligent performance of contract, he chooses the former; if it be negligence rather than warranty, he alleges negligence; if he happens to choose warranty, it may be an express one or one implied. And when the question later arises under an insurance policy as to what the facts alleged in the complaint do spell,

—for instance, whether they aver an accident,—the complaint must be taken by its four corners and the facts arrayed in a complete pattern without regard to niceties of pleading or differentiation between different counts of a single complaint. And the ultimate question is whether the facts alleged do fairly apprise the insurer that plaintiff is suing the insured upon an occurrence which, if his allegations are true, gives rise to liability of insurer to insured under the terms of the policy'."

In 49 A.L.R.2d at Page 711, it is stated as follows:

"Thus, all the cases agree that where it is the insurer's duty to defend, and the insurer wrongly refuses to do so on the ground that the claim upon which the claim against the insured is based is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages resulting to him as the result of such breach."

The said citation cites cases from the United States, Alabama, Arizona, Arkansas, California, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Vir-

ginia, Wisconsin and Canada.

The Idaho cases referred to are the cases of Coast Lumber Co. vs Aetna Life Ins. Co., 22 Idaho 264, 125 P.185 and Boise Motor Car Co. vs. St. Paul-Mercury Indemnity Co., 62 Idaho 438, 112. P.2d 1011.

In the case of Standard Surety and Casualty Co. of New York vs. Metropolitan Casualty Co. of New York, 67 N. E. 2d 634, Syllabus No. 3 is as follows:

> "Where automobile liability policy bound insurer to defend claims against insured and extended coverage to any organization legally responsible for use of automobile provided declared and actual use of automobile was pleasure and business or commercial, but insurer refused to defend personal injury actions against insured's employed for injuries allegedly caused by insured's negligent operation of his automobile in furtherance of employer's business, and another insurer which had issued a non-ownership liability policy to employer was compelled to conduct defense, employer's insurer was entitled to recover from employee's insurer expenses incurred in defending the action against employer."

In the case, one J. A. French and The United Insurance Company were sued by Hoskins and her husband. The petition alleged that French was an agent and employee of The United Insurance Company and that while acting in the course and scope of his employment he so negligently oper-

ated his automobile as to injure Mary F. Hoskins. The Metropolitan Casualty Ins. Co. had issued a policy to Mr. French, including an "omnibus clause." On page 635 the court says:

> "The contract of defendant by the policy it issued to French, bound it to defend any claim made against French, no matter how groundless, in which damages were claimed to have been sustained as a proximate result of his negligence in the operation of his automobile. The policy extended its coverage by the clause above quoted, to include: '* * * any person or organization legally responsible for the use thereof * * * provided declared and actual use of the automobile is "pleasure and business" or "commercial" * * *'."

> "It seems clear therefore that the plaintiff herein under the facts pleaded was entitled to the protection of the policy issued by the defendant to French (plaintiff's employee) under the provisions of the omnibus clause and the court was correct in overruling the defendant's demurrer, and the judgment, which was entered upon the defendant's refusal to plead to the issues presented by plaintiff's petition, must be sustained."

The Complaint in the case of Mary Lou Campbell, et al, vs. C. H. Elle, et al, state in paragraph V (R.154) that the defendants M. Burke Horsley and Max Larsen * * * were engaged as agents, servants or employees of the C. H.

Elle Construction Company and were at all times mentioned acting as such within the scope and course of their employment, and in Paragraph IV (R 154), that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon. It is clear, therefore, that under the allegations of the Second Amended Complaint in the case of Mary Lou Campbell, et al, vs. C. H. Elle Construction Company, et al, the C. H. Elle Construction Company and M. Burke Horsley were covered as additional insureds under the "omnibus clause." Therefore, under the ruling as set forth above that the obligation of the insurance company to defend is based upon the allegations of the Complaint that they were called upon to defend, we must then come to the only conclusion, that the Western Casualty and Surety Company had the obligation to provide the defense for the C. H. Elle Construction Company and M. Burke Horsley. Under the cases cited above, the failure of Western Casualty and Surety Company to so provide the defense makes them, therefore, liable for all damages suffered: that is, the Judgment obtained in the amount of $15,000.00, plus the costs thereof, together with the costs and expenses incurred for attorney's fees and additional expenses.

In 49 A.L.R.2d, beginning at Page 717, the cases and authorities are set out, showing under the circumstances outlined above the liability of the insurer when it refuses to accept the defense for the amount of the judgment, and on Page 721 the liability for insured's expenses incurred in defending the action, and on Page 727 the liability of the in-

surer for reasonable attorneys' fees incurred by the insured in defense of the action brought against him, and on Page 730 the liability of the insurer for court costs.

V.

USE OF INSURED TRUCK WAS WITH PERMISSION WITHIN MEANING OF THE POLICY

One of the principal questions to be determined in this case is whether the evidence shows that M. Burke Horsley, the person who was driving the Gagon's truck, and against whom judgment was obtained, was driving the insured vehicle with the permission of the insured within the meaning of the terms of the insurance policy. The "omnibus clause" included in the policy of the Western Casualty and Surety Company has been set forth above, and the facts as to the permission of M. Burke Horsley are contained in the Depositions before the Court.

On August 22, 1954, Horsley was driving the 1954 Chevrolet Truck owned by the Gagons. On that day, Mr. Horsley, according to his testimony, attempted to locate William Gagon and found that he was out of town fishing. He thereupon contacted Mrs. Jessie Gagon, the wife of William Gagon (R.137-138). Mr. Horsley contacted Mrs. William Gagon (Jessie Gagon) by telephone, finding her at her sister's. He asked her if he could borrow the vehicle, and she said "Yes." (R.109; R.137-138) After this telephone call, Mrs. Gagon met Mr. Horsley at the Gagon Lumberyard. Mrs. Gagon unlocked the Lumberyard door by keys that she had

in her possession (R.110), and gave Horsley the keys to the truck (R.111; 138-139).

In the testimony of both Mrs. Jessie Gagon and Mr. William Gagon, the fact is clear that after the date of the accident the Gagon Lumber Company forwarded a statement to the C. H. Elle Construction Company in the amount of $15.00 for the use of the truck, which was paid (R.111-112, 122). It is to be noted that the Deposition contains as Exhibits the statement of service in the amount of $15.00 to C. H. Elle Construction Company, as well as the ledger sheet showing the payment of said bill. This bill was forwarded to the C. H. Elle Construction Company under a bill dated October 6, 1954.

From the above testimony, several things stand out. It is to be noted that Mrs. Gagon did not hesitate nor refuse to loan the vehicle to Mr. Horsley. He definitely had the permission of Mrs. Jessie Gagon. She did not hesitate, on a Sunday, to go down to the Lumberyard, use her own keys to enter the Lumberyard, and give the vehicle plus the keys to Mr. Horsley.

The Gagon Lumberyard—Mr. and Mrs. Gagon—owned the vehicle involved in this controversy. It should further be noted that there was no discussion by Mrs. Gagon as to the payment for gas or oil or any other matters. This type of an arrangement could only come from long-standing mutual understandings.

In addition to the above, the testimony shows that Mr.

Gagon was in the company of M. Burke Horsley the day after the accident, and that they went by the scene of the accident. In view of this, the fact that Mr. Gagon at no time ever told Mr. Horsley that he did not have the permission of himself (Mr. Gagon) to use the vehicle is most significant. At no time was there ever any report made that the vehicle was used without permission, and it was never reported as missing.

It should also be noted that in October, 1954, approximately a month and a half after this accident, Mr. Gagon personally sent a bill, in his own hand-writing, to the C. H. Elle Construction Company for the rental value of this truck for the day of the accident. This bill was paid by the C. H. Elle Construction Company. It should be noted that the date of this bill, October 6, 1954, was prior to the institution of any suits in the State Court by Mrs. Campbell, prior to any suit in the Federal Court in the present matter, rior to any demands made by the C. H. Elle Construction Company or St. Paul-Mercury Indemnity Company that Western Casualty and Surety Company take over the defense in this matter.

One further point should be mentioned at this time. The S.R.21, Notice of Policy under Section 5 of the Idaho Motor Vehicle Safety Responsibility Act, a discussion of which will be set forth below, was dated October 5, 1954. We submit from the evidence set forth above that M. Burke Horsley was driving the insured vehicle with the permission of the insured within the meaning of the terms of the insurance policy.

In 5-A Amer. Juris. 92, Automobile Insurance, Section 94, it is stated:

> "The permission required to bring an additional insured within the protection of an omnibus clause may, as a general proposition, be express or implied, and the omnibus clause may expressly provide, or be required by statute to provide, that the permission of the named insured may be express or implied. Where the word 'permission' or 'consent' appears in the omnibus clause without definition, it is construed to include implied permission, and this implication may be a product of the present or past conduct of the insured. Implied permission is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used. * * * Under some circumstances, however, even silence may be sufficient to show an implied permission; or it may not even be necessary that the owner be aware of the identity of the operator or know of the particular use being made of the vehicle at the time of the accident."

In 5 A.L.R.2d, 608, under an annotation on the omnibus clause, it is stated as follows:

> "While in many instances the omnibus clause expressly provides that the permission of the named insured may be express or implied, thus avoiding

any doubt in regard to this matter, the more common practice among insurers is not to refer specifically in the clause to the nature of the required provision. However, there can hardly be any doubt that the term 'permission,' even if standing alone, include as the word is used in the omnibus clause permission implied by the present or past conduct of the insured."

In the case of American Employers Insurance Company vs. Cornell, 73 N.E.2d 70, it is stated:

"Appellee's Complaint sought to recover against appellant on a policy of liability insurance issued by the appellant to one Dora Griffin. Appellee had previously recovered judgments against one Ollie P. Beal, whom it was claimed was driving the automobile described in appellant's insurance policy, which struck appellee's tractor, inflicting the damages and the injuries upon which said judgments were based. It was claimed that the said Ollie P. Beal was driving this automobile at the time of the accident with the permission of the insured, Dora Griffin, and that appellant became obligated to pay the judgments by reason of the terms of the policy.

"The consolidated causes were tried to a jury and the verdict was returned in favor of the appellee for $5,000.00 and $2,900.00, that being the amounts of the two original judgments against Beal, with interest, and judgment was rendered on the same."

And on Page 73, the Court states as follows:

> "It is entirely possible for a person to have the implied permission of another to use an automobile under certain circumstances without having the right to enforce such use against the person granting such implied permission by silence.
>
> "The word 'permission' involves leave and license, but it gives no right. Vol. 32, Words and Phrases, Permanent Ed., Page 158; Flaherty vs. Nieman, 1904, 125 Iowa, 546, 101 N.W. 280."

The case of General Casualty Company of America vs. Woodby, 238 F.2d. 452 (1956), on Page 456, it is stated:

> "It is not necessary that permission to use the insured automobile be given in express words. It may be implied from all the facts and circumstances surrounding the parties. Verzoles vs. Home Indemnity Co., D. C., 38 F.Supp. 455, 458, affirmed 6 Cir., 128 F.2d 257; Indiana Lumbermen's Mutual Ins. Co. vs. Janes, 5 Cir., 230 F.2d 500; Glens Falls Indemnity Co. vs. Zurn, 7 Cir., 87 F.2d 988. The directives upon which appellants rely were verbal directives, never reduced to writing. The evidence did not show any specific instance when they were called to the attention of Spradlin. He had been with the company only several months. Spradlin, in testify-

ing, was not asked about such instructions. He apparently thought he had the authority to let Fritts have the car. * * * Both Mr. Cooper and Mr. Cheatham, when questioned about the matter after the accident, stated that Fritts was entitled to use the car for whatever purpose he wanted to. This was because in their opinion Fritts had purchased the car and was the owner of it. Even though they were wrong in their legal conclusions it shows that at the time of the accident, and thereafter when all the facts were known by them, they made no objection to Spradlin's actions in the matter and apparently acquiesced in his delivery of the Mercury to Fritts. The company continued to maintain this position until as late as September 17, 1954, when the company's attorneys, at the direction of Mr. Cheatham, wrote the garage that the company had no claim to or interest in the Mercury. * * * We think these facts were sufficient to take the case to the jury on the authority of Spradlin to give Fritts permission to use the car. United Services Automobile Assn. vs. Preferred Accident Ins. Co., 10 Cir., 190 F.2d 404, 406; Stoll vs. Hawkeye Cas. Co., 8 Cir., 193 F.2d 255, 260."

In the case of American Fidelity and Casualty Company vs. Pennsylvania Casualty Co., 97 Fed. Supp. 965, it is stated as follows:

"The question turns upon the meaning of the

phrase 'with the permission of the named insured.'

"Permission in such a case is treated as being 'consent, expressed or implied'. Traders and General Insurance Co. vs. Powell, 8 Cir., 177 F.2d 660, 663."

"In Stovall vs. New York Indemnity Co., 157 Tenn. 301, 8 S.W.2d 473, 477; 72 A.L.R. 1368, the Supreme Court of Tennessee said: 'It is our opinion that the words "providing such operation is with the permission of the named insured" were intended to exclude from the protection of the policy a person who should take the automobile and use it without authority in the first instance'."

In the case of Lanfried vs. Bosworth, 114 P.2d 406 (Calif.) it is stated on Page 407 as follows:

"In determining whether defendant Davis was driving the automobile with the consent of defendant Bosworth, the Court was confronted with the presumption that defendant Davis was innocent of crime or wrong. This presumption is sufficient to support a finding that defendant Davis operated the car with the consent of defendant Bosworth. Indeed, no contrary finding could be supported by the evidence. The Code section provides that the presumption is 'satisfactory' unless controverted by other evidence, but no other evidence was prsented to the court. In Prickett vs. Whapples, 10 Cal. App.

2d 701, 52 P.2d 972, 973, it was held that 'the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful'."

In the case of Prickett vs. Whapples, 52 P.2d 972, it is stated on page 973 as follows:

> "The law makes the temporary use of an automobile, without the owner's consent, a misdemeanor; hence the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful (Code Civ. Proc., s 1963, subd. 33). Such inference and presumption, may be overcome and are overcome when there is sufficient evidence to the contrary. We do not undertake to state generally what evidence would be sufficient to overcome them. Each case must be judged upon its own facts."

In the case of Brochu vs. Taylor, 269 N.W.711 (Wisc.), Syllabus 1 is as follows:

> "Under automobile liability policy containing omnibus clause covering anyone using automobile with the permission of insured, or adult member of his household, express permission need not be proved to render insurer liable, it being sufficient if facts reasonably tend to show that automobile was being used with implied permission of the insured."

In addition to the above facts which we submit show an

implied permission and also show a complete acquiescense in the activity of Mr. Horsley by Mr. Gagon, is the fact that Mrs. Jessie Gagon was the wife of the named insured, William Gagon, assisted in the operation of the business, and that presumptively the business was community property and, as Mrs. Gagon herself testified, "We owned the truck."

On the question of whether or not a wife may be the agent of her husband, the case of Carron vs. Guido, 54 Ida. 494, 33 P.2d 345, states as follows, page 347 of Pacific Reports:

> "The evidence shows respondent's wife waited on customers and made sales of merchandise in the store, prior to the sale to the boys, and, on some occasions, she did so in the absence of her husband. It is true the fact she was his wife does not show she was his agent in making the sale to the boys, nor does it show she was not. A husband may constitute his wife his agent and render her acts, within the scope of her apparent authority, binding on him. * * *
>
> "It is not necessary to establish agency by the production of a contract, or other direct proof, but it may be inferred from all the facts and circumstances in evidence, including the conduct of the parties, and when, as in this case, the evidence tends to show agency existed, the question of whether it did or not is for the jury. Amonson vs. Stone, 30 Idaho, 656, 167 P.1029; Madill vs. Spokane Cattle Loan Co., 39 Idaho, 754, 230 P.45; Flaherty vs. Butte

Electric R. Co., 43 Mont. 141, 115 P.40; Houston vs. Keats Auto Co., 85 Ore. 125, 166 P. 531; Dibble vs. San Joaquin Light & Power Co., 47 Cal. App. 112, 190 P.198; Reed vs. Anderson, 127 Ok. 64, 259 P. 855."

And in McShane vs. Quillan, 47 Ida. 542, 277 P.554, Syllabus 2 is as follows:

> "Husband ratifying wife's acts and participating in benefits accruing therefrom, with knowledge of alleged fraudulent representation by her to one for whom they acted as agents in renting and disposing of realty, would be equally liable with her for alleged fraud."

In the case of Spegeman vs. Vandeventer, 135 P.2d 186, (Calif.), Syllabus No. 6 is as follows:

> "A husband or a wife may act as agent for the other, and such agency may be proved by circumstantial as well as by direct evidence."

Syllabus No. 7 is as follows:

> "Much less proof is required to establish agency of one spouse for the other than in other cases."

Syllabus No. 8 is as follows:

> "An agency of one spouse for another may be established by proof of ratification of acts already performed without previous authority."

In the case of Chatfield vs. Farm Bureau Mutual Auto Ins. Co., 208 F.2d 250, 4 Cir. (1953), the court on Page 256 states as follows:

> "Our own decisions, we think, show a strong tendency toward a liberal interpretation, in favor of the insured, of the 'omnibus clause.' This clause should not be construed and applied, from a purely analytical viewpoint, under a literal interpretation of the words of the policy. The spirit, not the letter, should control. * * *"

In the case of Ford vs. Kann Sons Co., 76 A.2d, 358, Syllabus No. 2 is as follows:

> "A wife by her relationship alone has no power to act as agent for her husband but relationship is of such nature that circumstances which in the case of strangers would not indicate creation of authority or apparent authority may indicate it in case of husband and wife."

Syllabus No. 4:

> "Whether husband by his acts gave his wife, so far as plaintiff was concerned, apparent authority to pledge husband's credit for purchases, was for jury under evidence that husband and wife had joint checking account, that husband supplied money that went into account, that husband examined checkbook from time to time and saw that wife had drawn

checks to plaintiff, and that account ran for approximately one year prior to time wife allegedly deserted husband."

In the case of Croft vs. Malli, 105 A.2d 372 (Penn.), on Page 376 the Court states:

"* * * In the Restatement of Agency, sectoin 22, comment (b), cited with approval in Sidle vs. Kaufman, 345 Pa. 549, 29 A2d 77, 81, it is stated: 'Neither husband nor wife by virtue of the relationship has power to act as agent for the other. The relationship is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband or wife. Thus, a husband habitually permitted by his wife to attend to some of her business matters may be found to have authority to transact all of her business affairs.' In Mifflin County Riding and Driving Ass'n vs. Western Mut. Fire Ins. Co. or Urbanana, Ohio, 376 Pac. 157, 160, 161; 101 A.2d 683, 684, it was stated: ' "It is a well established principle that whatever evidence has a tendency to prove an agency is admissable even though it be not full and satisfactory, and it is the province of the jury to pass upon it. 'Direct evidence is not indespensible—indeed, frequently is not available—but instead circumstances may be relied on, such as the relation of the parties to each other and their conduct with reference to the subject matter of the contract'."

In Gregory v. Fassett, 116 A.2d 304 (Pa.), Syllabus No. 5 is as follows:

> "Where wife admittedly acted for husband in entering into loan agreement for purchase of restaurant, and executed a judgment note with provision for confession of judgment therein, and husband who had knowledge of his wife's action's, voiced no objection nor took any contrary action, subsequent confession of judgment on note was binding on husband as well as wife.

Syllabus No. 6:

> "An affirmance of an authorized transaction by agent may be inferred from failure to repudiate it."

In Engle vs. Farrell, 171 P.2d 588 (Calif.) Syllabus No. 3 is as follows:

> "A husband or wife may act as agent for the other and the agency may be proved by circumstantial as well as by direct evidence."

Syllabus No. 4:

> "In establishing fact of an agency between husband and wife, less evidence is required to establish the agency than in other cases and it may be established by proof of ratification of act already performed without previous authority."

It is submitted that the facts in this case come squarely

within the cases cited above and show that M. Burke Horsely had the implied permission of the insured. in that his wife acted as his agent in his absence, and show ratification of the acts of Mrs. Gagon. It should be noted that nowhere in the testimony is there any denial of Mrs. Gagon's right to loan the vehicle as she had loaned it. It is true that testimony is in the record that Mr. Gagon did not affirmatively tell Mrs. Gagon she had the right to loan the vehicle, but as is pointed out in the cases above, the question of permission is not that of an affirmative right but no affirmative denial of the right to do the act.

In Skut v. Hartford Accident and Indemnity Co., 114 A.2d 681 (Conn.) on Page 683 the Court states as follows:

> "The court concluded that Pugatch's liability to the plaintiff was covered by the policy. The correctness of that conclusion depends upon whether the court was warranted in finding that the actual operation of the car at the time the plaintiff's decedent was injured was with the permission of Mrs. Boardman. This latter finding is attacked by the assignment of errors. The evidence before the court on this subject was the same as the evidence on the former trial. In the former trial this evidence led the jury to the conclusion that at the accident Pugatch was operating the car as the agent of the Boardmans and in the course of his employment by them as a taxi driver. It is, of course, true that this finding of agency in the former trial is not conclusive on the defendant

in this case to establish coverage under its policy. Rochon v. Preferred Accident Ins. Co., Conn., 190, 194, 71 A. 429."

In the case of Hamm v. Camerota, 290 P.2d 713 (Wash.), Syllabus No. 3 is as follows:

"Judgment in action against driver of automobile and owners thereof, determining that driver was liable for injuries caused but that owners were not so liable, was not res judicata of issue whether driver had had owner's permission to drive automobile when accident occurred, and did not preclude recovery against owners' liability insurer under omnibus clause."

It is submitted that under the factual situation involved in this action, that M. Burke Horsely had permission to drive this vehicle. It is certainly clear that he was granted the right to use the car and the keys were turned over to him. It is submitted that from the facts and the law cited above the permission of Mr. Burke Horsely was such a permission as comes within the omnibus clause of this policy.

VI.

APPELLEE HAS ADMITTED IT'S POLICY INSURED APPELLANT

The record before the court in this case, we submit, contains a direct admission by the appellee that their policy covered the operator of this vehicle, M. Burke Horsely. The

S.R.21, Notice of Policy under Section 5 of Idaho Motor Vehicle Safety Responsibility Act, a copy of which is before the Court (R.58-59) and by the Stipulation set forth as a genuine copy of the instrument on file with the Commissioner of Law Enforcement, State of Idaho (R. 151), identifies the date of the accident, the location, that it was a 1954 Chevrolet 6-wheel 2-ton Truck, Serial No. X54F018590 that was involved in an accident with one Arnold Campbell. The S.R.21 goes on to state that the vehicle was operated by one M. Burke Horsely, Soda Springs, Idaho, and owned by William S. Gagon, Soda Springs, Idaho, and that the company signing said Notice states that its policy No. UI518973 issued to William S. Gagon, Soda Springs, Idaho, covered the above named owner and also applied to the above named operator. This S.R. 21 was signed as follows: "The Western Casualty and Surety Company, Fort Scott, Kansas by A. W. Kay, Secretary, American Agencies, Inc., General Agents." We submit that this is a direct admission that M. Burke Horsely was covered by this policy. This S.R.21 was submitted by the General Agents of the Western Casualty and Surety Company, signed by the said Agency and forwarded to the Department of Law Enforcement, State of Idaho, pursuant to statute. There is nothing in the record to controvert the authority of the General Agent, to controvert the signature of A. W. Kay or to in any way destroy the force and effect of this admission. This S.R. 21 is required by statute and the statute of the State of Idaho, of which the Federal Court, of course, takes judicial notice, is to the effect that any person who without authority should sign such a notice shall be

deemed guilty of misdemeanor. It is, and must be, assumed that Mr. A. W. Kay was not guilty of a misdemeanor.

In the case of Behringer vs. State Farm Mutual Automobile Insurance Company, 82 N.W.2d 915, the Court discusses the effect of an insurer filing the S.R.21 Form under the Safety Responsibility Law. Syllabus No. 1 is as follows:

> "Where an insurer has through an authorized officer, employee or agent filed an SR-21 form for purpose of complying with Safety Responsibility Law, insurer cannot thereafter deny liability upon policy because of any act occurring, or fact existing, as of the time of such filing which it then knew or could have known through the exercise of due diligence."

Syllabus No. 2 is as follows:

> "Where an insurer has through an authorized officer, employee or agent filed an SR-21 form under the Safety Responsibility Law, insurer has conclusively certified that under the facts then existing its policy insured both the named owner and the operator of the particular vehicle described in the form as to which the same was filed."

Syllabus No. 3 is as follows:

> "Where insurer filed an SR-21 form under Safety Responsibility Law showing coverage of both the named owner and operator of the vehicle involved in accident, it was thereafter precluded from

denying coverage on ground that driver of vehicle was operating same without a valid license, or that liability of additional insured arose by contract within meaning of policy excluding coverage in such cases, since such facts could have been established by insurer using due diligence before filing of form. W.S.A. 85.08(7), 85.08(9) (c)."

And on Page 918 the Court states as follows:

"We are therefore constrained to hold that, when a company has through an authorized officer, employee, or agent filed an SR-21 with the commissioner for the purpose of complying with the Safety Responsibility Law, the company cannot thereafter deny liability upon its policy because of an act occurring, or fact existing, as of the time of such filing, which it then knew, or could have known through the exercise of due diligence. In other words, the legal effect of filing an SR-21 under such circumstances is to conclusively certify that under the facts then existing its policy insured both the named owner and the named operator of the particular vehicle described in the SR-21 as to which the same was filed."

VII.

DAMAGES

It is submitted that in this case if the Appellate Court

should find that the appellants are entitled to recovery, then the amounts of damages are fixed. It is agreed that the Judgment against C. H. Elle Construction Company and M. Burke Horsley in the State Court amounted to $15,000.00 plus Court costs awarded in the amount of $371.40. (Plaintiffs' Request for Admissions II-G (R.47-48) and Response of Defendant thereto (R.61).

It is further admitted, pursuant to paragragh III-B of the Stipulation (R.151) that amounts paid for attorneys fees for the defense of C. H. Elle Construction Company and M. Burke Horsley and Max Larsen amounted to $1,500.00 and that said attorneys expended $139.53 for costs. The attached statement regarding the costs indicates that said costs were necessary in defending the action, being filing, appearances, long distance telephone calls, witness fees advanced and traveling expense in investigation. These amounts, then, are fixed.

The policy of Western Casualty and Surety Company set forth policy limits. These policy limits are for bodily injury liability to one person $10,000.00 and property damage liability in the amount of $10,000.00 for each accident (See policy No. UI518973, (R.51-55). In Exhibit "A" attached to the Stipulation (R.153-159) it is noted that the demands of the plaintiff in the State Court consisted of demands for damages arising from the death of Mr. Campbell in the amount of $100,000.00 and, in the Third Cause of Action thereof, damages in the amount of $1,620.00 for property damage to the automobile. From the verdict of the

jury, Exhibit "D" attached to the Stipulation, (R.177) it is noted that the verdict was in the sum of $15,000.00 embracing all causes of action. Therefore, it must be assumed that all causes of action were considered and that the $15,000.00 includes the $1,620.00 property damage claimed, as well as claims for personal injury.

There is, therefore, the amounts of $10,000.00, personal liability, $1,620.00 property liability, making a total of $11,620.00, plus $371.40 court costs expended in the defense of the action; in addition to which there is $1,500.00 attorneys' fees, plus other expenses of $139.53. This makes a grand total of $13,630.93.

The Supplemental and Amended Complaint does pray for $13,259.53, plus costs incurred herein, but it further asks for such other and further relief as to this Honorable Court may seem meet and equitable in the premises. The proof will show a total of $13,630.93, and it is submitted, therefore, that such figure is the figure to be awarded the appellants in this action.

CONCLUSION

It is submitted that each and every material allegation of appellants Amended and Supplemental Complaint in this matter has been proven. The Western Casaulty and Surety Company issued a policy to William S. Gagon, and by its terms the driver of the vehicle, if he be driving with permission of the named insured, is an also insured and is entitled to all of the protection and contractural obligations set forth

in said policy. It is unquestioned that M. Burke Horsley, as an employee of C. H. Elle Construction Company, a corporation, was operating the vehicle covered by this policy when he was involved in a collision, the end result of which amounted to a judgment being rendered against the said M. Burke Horsley and C. H. Elle Construction Company in the amount of $15,000.00 plus costs. It is submitted that under the facts set forth in this record that the implied permission of Jessie Gagon to allow M. Burke Horsley to use this vehicle cannot be disputed, and, in addition to this, there is the absolute and undenied acquiescence of Mr. Gagon in the conduct of his wife in that at no time after learning of the exact situation did he ever deny the permission, but by his conduct expressly acquiesced therein.

It is submitted, therefore, that Judgment should be rendered for and on behalf of the appellants in this action against the Western Casualty and Surety Company for the total sum of $13,630.93, plus interest, and costs of this action.

Respectfully submitted,

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL

Attorneys for Appellants

Residence: Pocatello, Idaho

APPENDIX

EXHIBITS

Exhibits	Identified	Offered	Received
Plaintiffs Exhibit A	R112	R114	R152
Defendant's Exhibit 1	R116		
S. R. 21	R58-59		3105, 151
Exhibits Attached to Stipulation:			
Exhibit A	R153		R153
Exhibit B	R159		R159
Exhibit C	R166		R166
Exhibit C-1	R172		R172
Exhibit D	R177		R177
Exhibit E	R177		R177
Exhibit F	R40-41		R40-41
Exhibit G	R179		R179